

The Appeals Board has reviewed the record and considered the stipulations listed in the Award.

ISSUES

The sole issue raised by respondent in its Application for Review is the liability of the Workers Compensation Fund.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the record and considered the briefs and arguments of the parties, the Appeals Board finds that the Award by the Administrative Law Judge should be affirmed.

The parties entered into an agreed Award which was approved by the Administrative Law Judge on April 6, 1995. That Award specifically reserved all issues between respondent and the Workers Compensation Fund. In her Award of April 29, 1996, the Administrative Law Judge found the Workers Compensation Fund (Fund) not liable for any portion of the benefits payable in this case.

Claimant had preexisting bilateral carpal tunnel injuries and other repetitive use conditions including tenosynovitis which were the subject of a prior claim. Thereafter, claimant developed de Quervain's disease, another repetitive-use-type injury. The resulting workers compensation claim was also settled. The present claim is for yet another repetitive use injury to claimant's bilateral upper extremities which has been diagnosed as Dupuytren's disease, which is also known as palmar fibromatosis.

The purpose of the Kansas Workers Compensation Fund is to encourage the employment of persons handicapped as a result of mental or physical impairments by relieving employers, wholly or partially, of workers compensation liability resulting from compensable accidents suffered by these employees. *Morgan v. Inter-Collegiate Press*, 4 Kan. App. 2d 319, 606 P.2d 479 (1980); *Blevins v. Buildex, Inc.*, 219 Kan. 485, 487, 548 P.2d 765 (1976).

K.S.A. 44-566(b) provides:

"'Handicapped employee' means one afflicted with or subject to any physical or mental impairment, or both, whether congenital or due to an injury or disease of such character the impairment constitutes a handicap in obtaining employment or would constitute a handicap in obtaining reemployment if the employee should become unemployed and the handicap is due to any of the following diseases or conditions:

....

" 2. Diabetes;

. . . .

"15. Loss of or partial loss of the use of any member of the body;

"16. Any physical deformity or abnormality;

"17. Any other physical impairment, disorder or disease, physical or mental, which is established as constituting a handicap in obtaining or in retaining employment."

An employer is wholly relieved of liability when the handicapped employee is injured or disabled or dies as a result of an injury and the injury, disability or the death probably or most likely would not have occurred but for the preexisting physical or mental impairment. See K.S.A. 44-567(a)(1).

An employer is partially relieved of liability when the handicapped employee is injured or is disabled or dies as a result of an injury and the injury probably or most likely would have been sustained without regard to the preexisting impairment but the resulting disability or death was contributed to by the preexisting impairment. See K.S.A. 44-567(a)(2).

In either situation, it is the employer's responsibility and burden to show it hired or retained the handicapped employee after acquiring knowledge of the preexisting impairment. K.S.A. 44-567(b) provides:

"In order to be relieved of liability under this section, the employer must prove either the employer had knowledge of the preexisting impairment at the time the employer employed the handicapped employee or the employer retained the handicapped employee in employment after acquiring such knowledge. The employer's knowledge of the preexisting impairment may be established by any evidence sufficient to maintain the employer's burden of proof with regard thereto."

In this case, knowledge on the part of the employer of a preexisting impairment that could constitute a handicap in claimant's ability to obtain or retain employment is not seriously contested. The issue herein pertains to whether there was a causal relationship between claimant's preexisting conditions and her subsequent development of the palmar fibromatosis condition in her hands which is the subject of this claim.

Three physicians testified in this case. Ernest R. Schlachter, M.D., was a general practice physician in Wichita, Kansas for 40 years before he limited his practice solely to medical/legal work. He initially examined claimant for purposes of an independent medical

examination at the request of her attorney. Dr. Schlachter testified that claimant's prior bilateral carpal tunnel syndrome and her subsequent de Quervain's disease were both disease processes known as overuse syndromes and were caused by claimant's repetitive activities at work. In his opinion, claimant, therefore, had a further progression of the initial disease process due to her continued repetitive work activities which developed into other symptoms of overuse syndrome. However, that progression was not a natural progression of claimant's prior injuries, but rather was one caused by her work, according to Dr. Schlachter. In this case, claimant developed palmar fibromatosis or Dupuytren's disease. Dr. Schlachter considered the carpal tunnel syndrome and the de Quervain's disease to have predisposed claimant to developing Dupuytren's disease. Dr. Schlachter opined that claimant would not have sustained her bilateral Dupuytren's disease but for the preexisting bilateral carpal tunnel syndrome and de Quervain's disease.

Kenneth D. Zimmerman, M.D., is employed full time for respondent as a company physician. He, likewise, testified concerning a medical relationship between claimant's prior problems and her developing Dupuytren's disease. In addition, Dr. Zimmerman considered claimant's preexisting borderline diabetic condition to have predisposed her to developing Dupuytren's disease. Dr. Zimmerman was of the opinion that claimant would not have sustained her Dupuytren's disease but for her diabetes and prior repetitive use injuries.

James L. Gluck, M.D., is a board-certified orthopedic surgeon in Wichita, Kansas. He was claimant's primary treating physician from August 1992 through October 1994. His treatment included surgery for claimant's bilateral carpal tunnel syndrome and her de Quervain's tenosynovitis. Claimant's complaints of palmar fibromatosis started in March 1994. In his opinion claimant's prior overuse syndrome or repetitive trauma conditions did not predispose her to developing palmar fibromatosis. In addition, although there is a higher incidence of upper extremity repetitive-use-type injuries, including palmar fibromatosis, in diabetics, Dr. Gluck did not believe there was a causal connection in claimant's case between her diabetes and her development of palmar fibromatosis. He attributed claimant's palmar fibromatosis condition solely to her work activities.

In this case, the Appeals Board finds the testimony of the treating physician, Dr. Gluck, to be the most credible. Claimant's preexisting conditions did not cause or contribute to the palmar fibromatosis which is the diagnosis for the injury which is the subject of this claim. Accordingly, respondent has not met its burden of proving Fund liability. The Award by the Administrative Law Judge should be affirmed.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Nelsonna Potts Barnes dated April 29, 1996, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of October 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Andrew E. Busch, Wichita, KS
 Eric K. Kuhn, Wichita, KS
 Kurt W. Ratzlaff, Wichita, KS
 Nelsonna Potts Barnes, Administrative Law Judge
 Philip S. Harness, Director

SARAH A. FRAZIER
Claimant

THE BOEING CO. - WICHITA
Respondent

**AMERICAN MANUFACTURERS MUTUAL
INSURANCE COMPANY**
Insurance Carrier

KANSAS WORKERS COMPENSATION FUND

ORDER

APPEARANCES

RECORD AND STIPULATIONS

The Appeals Board has reviewed the record and considered the stipulations listed in the Award.

ISSUES

The sole issue raised by respondent in its Application for Review is the Administrative Law Judge's denial of respondent's Review and Modification Motion.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the record and considered the briefs and arguments of the parties, the Appeals Board finds that the Review and Modification of an Award of the Administrative Law Judge should be affirmed.

The parties entered into an agreed Award which was approved by the Administrative Law Judge on April 6, 1995. That Award called for permanent partial disability benefits based upon a 59 percent work disability. This represented an average of claimant's 77 percent loss of ability to perform work tasks and 41 percent wage loss.

The Findings of Fact in said Award provided:

"8. Any party may request review and modification of this Award pursuant to an increase or diminishment in claimant's post-injury average weekly wage. However, the stipulations and findings herein that claimant has lost the ability to perform 77% of her prior work tasks and has a pre-existing functional impairment of 12% may not be reviewed or modified. It is by the parties agreed that the settlement of \$60,000.00 represents all of the compensation that claimant will receive for the remainder of claimant's life. It is further agreed that the remaining actuarial life span of claimant is 26 years. The lump sum settlement, therefore, represents \$192.31 per month of compensation.

"9. Claimant is ordered and has an affirmative duty to notify respondent and insurance carrier of any increase in claimant's average weekly wage within thirty (30) days after such increase becomes effective.

"10 In accordance with K.S.A. 44-511, 'average weekly wage' shall be construed to mean the total of money (meaning all remunerations, whether on an hourly, output, salary, commission, or other basis) and any additional compensation (including gratuities in cash or 'tips,' cash bonuses paid by the employer, board and lodging furnished by the employer as part of wages, remuneration for services in any medium other than cash where in lieu of money, employer-paid life insurance, health and accident, and employer contributions to pension and profit sharing plans) claimant receives for services rendered to an employer.

“11. Modification of this Award shall be effective as of the date of the increase or diminishment in claimant’s average weekly wage actually occurs. Failure of claimant and/or her attorney to duly notify respondent and insurance carrier of an increase in claimant’s average weekly wage shall act as a waiver of the statutory limitation that the effective date of any modification shall not be more than six (6) months prior to the date the application was made for review and modification. The provisions of this paragraph shall not preclude the parties from seeking any other remedies which may be applicable in law or equity, including but not limited to those set forth in K.S.A. 44-5,121 and 44-5,125.”

Respondent’s Application for Review and Modification filed October 9, 1995, sought to obtain an offset pursuant to K.S.A. 44-501(h) for the \$249 per month claimant was receiving in retirement benefits. Claimant began receiving the retirement benefits in January of 1995 and was receiving same from respondent at the time of the agreed Award.

K.S.A. 44-528(a) provides:

“(a) Any award or modification thereof agreed upon by the parties, except lump-sum settlements approved by the director or administrative law judge, whether the award provides for compensation into the future or whether it does not, may be reviewed by the administrative law judge for good cause shown The administrative law judge shall hear all competent evidence offered and if the administrative law judge finds that the award has been obtained by fraud or undue influence, that the award was made without authority or as a result of serious misconduct, that the award is excessive or inadequate or that the functional impairment or work disability of the employee has increased or diminished, the administrative law judge may modify such award, or reinstate a prior award, upon such terms as may be just, be increasing or diminishing the compensation subject to the limitations provided in the workers compensation act.”

On December 19, 1995, the Administrative Law Judge heard respondent’s Application for Review and Modification of the Award. By a Decision rendered of April 29, 1996, the Administrative Law Judge denied respondent’s application, finding:

“There has been no evidence submitted to indicate that the prior agreed upon award was obtained by fraud or undue influence. The respondent presented no argument that the award was made without authority or as a result of serious misconduct. There has been no demonstration of evidence indicating that the award is excessive or inadequate, or that the functional impairment or work disability of claimant has been increased or diminished. Accordingly, the Administrative Law Judge declines to grant respondent’s application for review and modification.”

At the time of the agreed Award, claimant was retired. Counsel for respondent alleges that respondent did not discover that claimant was receiving retirement benefits until after the settlement. It defies logic for respondent to deny knowledge of the retirement benefits it was paying claimant at the time of the agreed Award. It must be presumed that the agreed Award represents the entire agreement between the parties. The agreed Award made no provision for an offset. There is no evidence of an intent by the parties that an offset for retirement benefits be permitted. Furthermore, there has been no showing of an increase or decrease in the amount of retirement benefits claimant is now receiving as compared to what she was receiving at the time of the agreed Award. Accordingly, review and modification of the Award should be denied.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Review and Modification of an Award entered by Administrative Law Judge Nelsonna Potts Barnes dated April 29, 1996, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of October 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Andrew E. Busch, Wichita, KS
Eric K. Kuhn, Wichita, KS
Kurt W. Ratzlaff, Wichita, KS
Nelsonna Potts Barnes, Administrative Law Judge
Philip S. Harness, Director